subject to higher taxes than identical intrastate sales in hundreds of Missouri cities and counties.

The stipulated facts show that petitioner pays more tax when it buys glass from a vendor in another state than the tax it pays when it buys the same product from other cities–and counties within Missouri. For example, when petitioner buys $50,000 worth of products by mail order from Belleville, Illinois, it pays $2,737.50 in use tax. But when it orders the same amount of goods from a supplier in Williamsburg, Missouri, its sales-tax bill is only $2,362.50, and it is entirely exempt from use tax. Obviously, petitioner would tend to favor the Missouri supplier because it can save almost $400 in taxes. This is precisely the type of economic protectionism that the Commerce Clause proscribes.

Section 144.757 of the Missouri statutes has created this patchwork system by allowing taxing subdivisions to adopt a local use tax that in many instances exceeds the local sales tax in neighboring locales. By way of further example, the use tax rate in the City of St. Louis (6.950%) is higher than the sales tax rate in 75 municipalities in adjoining St. Louis County. And while 361 taxing jurisdictions impose a use tax that is greater than the lowest sales tax (4.725%) charged by some 137 cities and counties, a number of cities – including the state's two largest municipalities – extract a use tax that is *substantially* higher and exceeds the sales tax rate in most areas: Brookfield (6.975% use tax); Excelsior Springs-Clay (7.100%); Foristell (7.325%); Holden (7.225%); Holts Summit (7.225%); Kansas City-Platte (6.975%); Kimberling City (7.975%); Knob Noster (7.725%); New Melle (6.825%); City of St. Louis (6.950%); and Wentzville (7.825%) (Stip. Ex. A). This scheme is as constitutionally infirm as the predecessor

Missouri system that was invalidated in *AIM*, 511 U.S. 641. This Court should grant review to ensure that Missouri does not end-run the ruling in *AIM* and to discourage other states from adopting similar balkanizing use tax provisions.

The "dormant" aspect of the Commerce Clause of the United States Constitution prohibits state actions "which may fairly be deemed to have the effect of impeding the free flow of trade between the states." *Freeman v. Hewitt*, 329 U.S. 249, 252 (1946). Under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), a tax on interstate activities may be sustained only when it (a) has a substantial nexus with the taxing state, (b) is fairly apportioned, (c) does not discriminate against interstate commerce, and (d) is fairly related to the services provided by the State. A taxing statute discriminates against interstate commerce if it "provid[es] a direct commercial advantage to local business." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977); *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981). Simply stated, the "dormant" commerce clause requires equality of treatment between local and interstate commerce. *Granholm v. Heald*, 125 S.Ct. 1885, 1895 (2005); *AIM*, 511 U.S. at 648; *Maryland v. Louisiana*, 451 U.S. at 759. State statutory provisions that discriminate against interstate commerce are virtually *per se* invalid. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry. *Chemical Waste Mgm't, Inc. v. Hunt*, 504 U.S. 335, 342 (1992).

The question presented here is whether Missouri is treating out-of-state competitors unequally and whether petitioner, as a taxpayer, is being discouraged from buying

interstate goods and taxed disproportionately when it does. As stated in *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984), "A State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." It is irrelevant whether the discrimination is intentional. *Amerada Hess Corp. v. New Jersey Taxation Div.*, 490 U.S. 66, 75 (1989); 1 Hellerstein and Hellerstein, "State Taxation" § 4.13, p. 4-69 (3d ed. 2004).

This Court has been vigilant in its policing of state use tax legislation because a use tax is a particularly effective vehicle for favoring local business over foreign competition. In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), the Court struck down a Louisiana use tax. Although the Louisiana scheme imposed sales and use taxes at the same rate, in some transactions certain components of out-of-state products were not taxed in intrastate sales. The statute also exempted articles bought second-hand in Louisiana, while taxing under the use tax similar articles purchased in the same fashion in another state. Based on the way the statute operated in practice, the Court held it unconstitutional:

> "The conclusion is inescapable: Equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out of state." *Id.* at 70.

The Missouri use tax scheme at issue here is but a minor variant of the one invalidated in *AIM*, and the result is that Missouri as a whole discriminates against interstate commerce just as thoroughly and invidiously as it did under the prior system. The discrimination in *AIM* existed because residents of a taxing district having a local

sales tax rate of less than 1.5% would pay a higher use tax rate on goods ordered from out of state than the sales tax they would pay if they bought the same item at their neighborhood store. The current Missouri system creates the same kind of discrimination. Petitioner is regularly faced with a choice that disadvantages the out-of-state seller, for petitioner can order products from any one of 523 Missouri cities and counties where the total sales tax rate is less than the 5.475% use tax imposed on out-of-state goods delivered to petitioner's place of business in Kirkwood (Stip. Ex. A).[4]

Relying on the fact that *AIM* focused on intra-district parity, the Missouri Supreme Court below erroneously confined its analysis to individual taxing districts to see if they charged greater use taxes than sales taxes. Indeed, the court's inquiry was constrained by the belief that "for commerce clause purposes the courts will compare the use and sales tax charged by a single taxing jurisdiction to determine whether the use tax is compensatory" (A-10). That view ignores the facts (a) that the taxing authority under scrutiny in this case is the State of Missouri and (b) that the competitive marketplace is not circumscribed by arbitrarily-drawn city or county lines. The *AIM* Court held

[4] The Missouri Supreme Court's statement that "Kirkwood Glass cannot manufacture a constitutional infirmity in the tax laws by manipulating the ultimate location for the sale and delivery of the item" (A-10) is out of focus. The court seemed to assume that petitioner would need to take delivery of a purchased item within a low-sales-tax district in order to benefit from that tax rate. Not so. As explained above, § 32.087.12(1) provides that for sales tax purposes, all sales "shall be deemed to be consummated at the place of business of the retailer" (A-35). Thus, when petitioner places an order to a supplier in Williamsburg to be delivered in Kirkwood, it is taxed at the 4.725% sales tax rate applicable in Williamsburg.

that a state, which cannot discriminate against interstate commerce, cannot accomplish that result indirectly by authorizing its taxing subdivisions to do so: "It may not grant its political subdivisions a power to discriminate against interstate commerce that the State lacked in the first instance." *AIM*, 511 U.S. at 653. Missouri has again transgressed that principle.

To be sure, *AIM* focused on individual taxing districts whose use tax exceeded their own sales tax. The Court rejected the state's argument that the resulting discrimination should be ignored because in other localities the sales tax exceeded the use tax, and overall the taxing scheme imposed greater burdens on intrastate than on interstate commerce. *Id.* at 646. But *AIM* did not hold, as the court below seemed to think, that a state-wide system passes constitutional muster merely because each taxing subdivision appears to tax interstate and intrastate commerce equally while the overall pattern of sales/use taxes produces numerous instances in which the interstate seller is disadvantaged. Indeed, in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Revenue*, 504 U.S. 353, 361-63 (1992), the Court held that the discriminatory impact of a state statute is not ameliorated by the fact that in some counties foreign and local commerce are treated equally.

Nor can the Missouri use tax be justified on the basis that it "compensates" for the sales tax within the contemplation of *Silas Mason*, 300 U.S. at 583-84. The use tax is not "compensatory" or "complimentary" because it is imposed only on out-of-state purchases, not on all purchases outside the taxing jurisdiction. Although the sales and use tax rates imposed by a given jurisdiction appear identical in form, the foregoing examples show that in

substance and operation they are not. Any purchase from within Missouri that is delivered into another taxing jurisdiction is completely exempt from the use tax. By contrast, if petitioner were to buy and take delivery of goods in another state for use in Kirkwood and pay a sales tax of, say, 4%, to the foreign state, it would be entitled only to a pro rata credit in that amount and would still be liable for 1.475% in Missouri use taxes.[6]

Use taxes that are truly "complementary" or "compensating" pass muster under the Commerce Clause only because the burden on an out-of-state merchant is equal to that of his local competitor and a resident buyer can choose between domestic and foreign vendors without regard to sales/use tax differentials. In *AIM*, the Court said that "Missouri's use tax scheme, however, runs afoul of the basic requirement that, for a tax system to be 'compensatory,' the burdens imposed on interstate and intrastate commerce must be equal." 511 U.S. at 648. In *Boston Stock Exchange*, 429 U.S. at 332, the Court summarized the narrow scope of the doctrine of "compensating" use taxes:

> "In all the use tax cases, an individual faced with the choice of an in-state or out-of-state purchase could make that choice without regard to the tax consequences. If he purchased in State, he paid a sales tax; if he purchased out of State but carried the article back for use in State, he paid a use

[6] The Court in *AIM* commented on such a discrepancy: "By its terms, the additional use tax at issue in this case appears to violate the Commerce Clause's cardinal rule of nondiscrimination, for it exempts from its scope all sales of goods occurring within the State." *AIM*, 511 U.S. at 647. The Missouri legislature did nothing to remedy this unfairness when it created the post-*AIM* use tax structure.

> tax on the same amount. The taxes treated both transactions in the same manner."

As indicated above, the Missouri Supreme Court's opinion is also in conflict with the decision of the Ohio Supreme Court in *American Modulars*, 376 N.E.2d 575 – a case ignored in the opinion below. The Ohio tax system provided for a state use tax of 4% and a state sales tax of 4%. It also authorized counties to impose a .5% county sales tax if they also imposed a corresponding .5% use tax. As the Ohio court observed, this scheme "appears, on its face, to provide uniform sales and use taxes at the county level." *Id.* at 577. But further analysis revealed that it discriminated "in an 'ingenious' rather than a 'forthright' manner." *Id.*, citing *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940). Because individual counties were not required to impose the .5% sales and use taxes, "not all property purchased in the state is subjected to a one-half percent county sales tax." *Id.* Purchasers from out-of-state in counties that had adopted the county .5% use tax would be paying more tax than in-state buyers in other counties, and hence the overall state scheme "provides a direct commercial advantage to local purchases which impedes the free flow of trade between the states" and "discriminates against out-of-state acquisitions as invidiously as it would if it subjected those purchases to unfavorable tax basis . . . or if there were no county sales tax at all." *Id.* at 577-78 (citation omitted). *American Modulars* is squarely on point, and the Ohio court got it right.

Allegiance to the "strict rule of equality adopted in *Silas Mason*," *see Halliburton*, 373 U.S. at 71, requires either (a) that the total sales tax and use tax be paired in all instances; (b) that the highest use-tax rate in a state be no higher than the lowest sales tax rate within that state;

or (c) that in-state purchasers be allowed a credit for sales taxes paid, rather than a complete exemption.[6] The Missouri system does not come close to meeting the standard of equality. This Court should grant certiorari to reinforce the holding in *AIM* and draw a bright constitutional line in the sand to put an end to such "ingenious" use-tax experimentation.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[6] A credit for Missouri sales tax paid, like the credit for foreign sales tax paid allowed by § 144.615(5), would equalize the tax burden in all cases, thus rendering the Missouri scheme identical to the Georgia system cited with approval by the Court in *AIM*, 511 U.S. at 653-54, citing Ga. Code Ann. § 48-8-110 (Supp. 1994).

APPENDIX A

IN THE
SUPREME COURT OF MISSOURI

En Banc

No. 86347

KIRKWOOD GLASS CO., INC.,	)	
Appellant,	)	**Petition for Review of a Decision of the Administrative Hearing Commission**
v.	)	
DIRECTOR OF REVENUE,	)	
Respondent.	)	

June 21, 2005

STITH, Judge:

In January 2003, Kirkwood Glass filed an application for a use tax refund with the Department of Revenue, alleging an overpayment of local use taxes and seeking a refund for amounts remitted from September 1999 through June 2002. It claimed that the Missouri statutes permitting cities and other localities to impose local use taxes, ***see* sections 144.757 to 144.761, RSMo 2000**[1], violate article I, section 8, clause 3 of the United States Constitution (the "Commerce Clause").

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[1] All statutory citations are to RSMo 2000 unless otherwise indicated.

Specifically, Kirkwood Glass argues that Missouri's use tax statutes impermissibly burden interstate commerce. It notes that under some circumstances the statutes permit a purchaser to pay less in sales tax to purchase an item at retail from a particular Missouri local jurisdiction than it would pay in use tax if it purchased the same item from an out-of-state vendor but had it delivered to a different, higher-taxing Missouri local jurisdiction. It concedes the purchaser would pay the same or less use tax as sales tax if it had the item delivered by the out-of-state vendor to the local Missouri taxing jurisdiction in which it bought the item at retail.

The Director of Revenue denied Kirkwood Glass' application for refund. It sought review of the decision by the Administrative Hearing Commission (AHC), which upheld the denial of the application for refund, finding it had no authority to reach the constitutional issue. Because Kirkwood Glass' appeal concerns the construction and validity of the revenue laws of the State, review is by this Court. **Mo. Const. art. V, sec. 3**. The AHC properly denied Kirkwood Glass' application for refund. A court is not required to compare purchases in one jurisdiction with deliveries to another jurisdiction in determining the constitutionality of a use tax. Under the United States Supreme Court's decision in ***Associated Industries of Missouri v. Lohman***, 511 U.S. 641, 647 (1994), a statute permitting imposition of a local use tax does not unconstitutionally burden interstate commerce where, as here, the statute requires such local use taxes to be less than or equal to the sales tax imposed on goods purchased in the locality to which the out-of-state item is delivered. Accordingly, the decision of the AHC is affirmed.

I. ANALYSIS

A. Standard of Review.

This Court upholds the factual determinations of the AHC "when authorized by law and supported by competent and substantial evidence . . . ". **Sec. 621.193.** ***See also Ford Motor Co. v. Dir. of Revenue,*** **97 S.W.3d 458, 460 (Mo. banc 2003).** In the instant case, the parties submitted this case on stipulated facts. This Court determines issues of law, including the constitutionality of Missouri statutes, *de novo.* ***Id.***

B. Missouri Sales Tax Laws.

Missouri imposes a uniform state use tax "for the privilege of storing, using or consuming within this state any article of tangible personal property . . . ". **Sec. 144.610.** Use taxes are meant to complement, supplement, and protect sales taxes by eliminating the incentive to purchase from out-of-state sellers in order to avoid local sales taxes. ***Fall Creek Const. Co., Inc. v. Dir. of Revenue,*** **109 S.W.3d 165, 169 (Mo. banc 2003).** They do this by taxing transactions in which no sales tax can be imposed because the items were purchased outside of Missouri. ***Smith Beverage Co. of Columbia, Inc. v. Spradling,*** **533 S.W.2d 606, 607 (Mo. 1976).**

Cities such as Kirkwood, and other local jurisdictions, are authorized to impose a local sales tax on purchases made at retail within a particular local jurisdiction. **Sec. 32.087, RSMo Supp. 2004.** Only if a local taxing jurisdiction chooses to impose such a local sales tax does the Missouri statute permit that jurisdiction to impose a local use tax, and the statute provides that the local use tax cannot be

greater than the local sales tax imposed in the particular locality involved. **Sec. 144.757**.

Essentially, this means that in jurisdictions that have elected to impose them, local use taxes may be collected on the sale of goods that are purchased outside of Missouri and delivered to the jurisdiction in question in an amount equal to or less than the local sales tax. ***Id.***; **12 C.S.R. 10-117.100(1)**. For instance, if a local jurisdiction, such as a city, imposes a local sales tax of 3.10 percent on purchases made at retail in the city, then it may impose a local use tax on purchases made from out-of-state vendors but delivered to persons in that city of not more than 3.10 percent. **Sec. 144.757**.

C. Commerce Clause Limitations on Local Use Taxes.

Kirkwood Glass now challenges **sections 144.757, 144.759, and 144.761**, alleging that these statutes, and local use taxes imposed in reliance on them, violate the Commerce Clause of the United States Constitution, article I, section 8, clause 3, by impermissibly discriminating against interstate commerce.

The Commerce Clause grants power to Congress to regulate commerce among the various States. **U.S. Const. art. I, sec. 8, cl. 3**. Implicit in the clause is also the "negative" or "dormant" command that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State . . . ". ***Associated Industries,* 511 U.S. at 647** (internal quotations omitted). ***See also Oregon Waste Systems, Inc. v. Dept. of Environmental Quality,* 511 U.S. 93, 98 (1994)**.

It is clear that the Commerce Clause does not prohibit all state or local use taxes. If a state or locality imposes a sales tax, it may impose a compensatory use tax, but the use tax must be truly compensatory in nature, that is, "the burdens imposed on interstate and intrastate commerce must be equal." ***Associated Industries*, 511 U.S. at 648.** ***See also Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963)** ("equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state"). If a use tax is compensatory, it is valid and will not be struck down as discriminating against interstate commerce. ***Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577, 582-83 (1937).**

The 1992 version of the Missouri use tax analyzed by the Supreme Court in ***Associated Industries*** was not merely compensatory. **Sec. 144.748, RSMo Supp. 1992 (repealed 1996)**, imposed a uniform state *use* tax of 1.5 percent on each item bought out-of-state and delivered to Missouri, even if the item was delivered to a person or entity in a local taxing jurisdiction that imposed no, or a lesser, local *sales* tax.

As the Supreme Court noted, this meant that a person who purchased an item at retail in a city with a local sales tax of less than 1.5 percent would pay less tax than would a person who lived in that city who ordered the item from an out-of-state vendor and so had to pay the uniform 1.5 percent state use tax. The two taxes, thus, were not substantially equivalent, and the use tax, therefore, was constitutionally infirm, for, "[w]here the use tax exceeds the sales tax, the discrepancy imposes a discriminatory burden on interstate commerce." ***Associated Industries*, 511 U.S. at 649**. The Supreme Court remanded for this

Court to determine whether the unconstitutional provisions could be severed.

D. Constitutionality of Missouri's Amended Local Use Tax Statutes.

On remand, this Court found that the unconstitutional provisions could not be severed and struck down section 144.748 in its entirety. ***Associated Industries of Missouri v. Dir. of Revenue*, 918 S.W.2d 780, 785 (Mo. banc 1996)**. The legislature then enacted the use tax laws at issue in this case, **sections 144.757 to 144.761**. These laws were intended to avoid the pitfalls identified by the Supreme Court in ***Associated Industries*** by providing that a local jurisdiction's use tax cannot be greater than its sales tax, stating:

> Any county or municipality . . . may, by a majority vote of its governing body, impose a local use tax if a local sales tax is imposed as defined in section 32.085, RSMo, *at a rate equal to the rate of the local sales tax* in effect in such county or municipality . . .

Sec. 144.757 (emphasis added).[2]

Kirkwood Glass now argues that the challenged laws again result in an impermissible burden on interstate commerce because it is possible for Kirkwood and other buyers to pay more use tax in one Missouri city than they would pay in

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[2] A prior version of the law, enacted in 1990, was repealed before it went into effect. **Sec. 144.747, Supp. 1990 (repealed)**. In 2004, the Missouri General Assembly made minor amendments to two of the challenged statutes, **sections 144.757 and 144.759, RSMo Supp. 2004**, which are not relevant to this opinion.

sales tax if they purchased goods in a different Missouri city. Specifically, the parties stipulated that when Kirkwood Glass purchased goods in the city of Kirkwood, it paid a total *sales* tax of 7.325 percent. This was made up of a state sales tax of 4.225 percent and a local city sales tax of 3.10 percent. The city's local use tax was 1.25 percent. So, when Kirkwood Glass bought an item from an out-of-state vendor and had it delivered to itself in the city, it paid a state use tax of 4.225 percent and a local use tax 1.25 percent, or a total *use* tax of 5.475 percent. Thus, it actually paid less in use tax than sales tax. This is constitutionally permissible, for, although a use tax can only be compensatory for a sales tax, the Supreme Court has "not suggested that lesser burdens on interstate trade are impermissible . . . ". ***Associated Industries*, 511 U.S. at 652 n.4.**

The parties' stipulation also provides that if Kirkwood Glass purchases goods in the town of Williamsburg, it incurs a total sales tax of only 4.725 percent because Williamsburg has a local city sales tax of only .5 percent. Williamsburg has no use tax. Thus, Williamsburg does not discriminate against interstate commerce, because a person buying a product from out-of-state for delivery in Williamsburg would pay .5 percentage points less use tax on the product than he or she would pay in sales tax were the item bought in Williamsburg.

But, Kirkwood Glass says, if it bought an item in Williamsburg, it would pay less sales tax than if it bought that item from an out-of-state vendor and had it delivered to Kirkwood. This, it asserts, constitutes an improper burden on interstate commerce. The question for this Court, then, is whether, by permitting such a result, Missouri's use tax statutes discriminate against interstate commerce by authorizing *local taxing jurisdiction A* to

impose local *use* taxes on out-of-state purchases that are higher than local *sales* taxes that *local taxing jurisdiction B* would impose on similar purchases made in that locality. The answer is found in the Supreme Court's decision ***Associated Industries***.

In striking down the Missouri statute at issue in that case, the Supreme Court made very clear that under the Commerce Clause, it is "*in localities where the use tax exceeds the sales tax,* [that] the system is impermissibly discriminatory . . . ". ***Associated Industries,* 511 U.S. at 643** (emphasis added). In other words, in determining whether a use tax is considered to be compensatory for a sales tax and therefore not discriminatory, one compares the use tax imposed *on purchases subject to use tax in a particular local jurisdiction* with other purchases *subject to sales tax made in that same local jurisdiction.* One does not compare purchases made in the first jurisdiction with those made in some other locality. As the Supreme Court stated in striking down the former version of Missouri's use tax, which imposed the same 1.5 percent use tax in every Missouri jurisdiction, even if the local sales tax were a lesser amount:

> But in Missouri, whether the 1.5% use tax is equal to (or lower than) the local sales tax is a matter of fortuity, depending entirely upon the locality in which the Missouri purchaser happens to reside. ***Where the use tax exceeds the sales tax,*** *the discrepancy imposes a discriminatory burden on interstate commerce. Out-of-state goods* ***brought into such a jurisdiction*** are subjected to a higher levy than are goods *sold locally.*

***Id.* at 648-49** (emphasis added).

In other words, ***Associated Industries*** prohibited a particular local jurisdiction from discriminating against interstate commerce by charging a higher use tax than sales tax, because a state, "may not grant its political subdivisions a power to discriminate against interstate commerce that the State lacked in the first instance." ***Id.* at 653**. But, several states "that provide political subdivisions some authority to impose use taxes have devised systems *to ensure that use taxes are not higher than sales taxes within the same taxing jurisdiction.*" ***Id.* at 654-55** (emphasis added), ***citing*, Ga. Code Ann., sec. 48-8-110, 111 (Supp. 1994)** (couples local use and sales taxes).

This is exactly what the Missouri legislature did when enacting the local use tax laws at issue here. As noted earlier, these statutes expressly provide that no local use tax can be imposed that exceeds the local sales tax of the jurisdiction, by stating:

> Any county or municipality . . . may, by a majority vote of its governing body, impose a local use tax if a local sales tax is imposed as defined in section 32.085, RSMo, *at a rate equal to the rate of the local sales tax* in effect in such county or municipality . . .

Sec. 144.757 (emphasis added). This means that no purchaser is required to pay a higher tax on items shipped to that jurisdiction than they would if they purchased the item in-state within the same locality. Out-of-state sellers are also assured that purchasers will not pay a higher tax than if the item were purchased in-state within the same locality. In fact, since several jurisdictions within Missouri impose no local use taxes at all, many out-of-state purchases are taxed at a *lower* rate than were the item

purchased in-state in the same jurisdiction to which the out-of-state item would be delivered.

II. CONCLUSION

Kirkwood Glass cannot manufacture a constitutional infirmity in the tax laws by manipulating the ultimate location for the sale or delivery of the item. While it, like any purchaser, is free to have items shipped from out-of-state to any local Missouri jurisdiction, just as it is free to purchase items from any local taxing jurisdiction within the state, for commerce clause purposes the courts will compare the use and sales tax charged by a single taxing jurisdiction to determine whether the use tax is compensatory. So long as, within each taxing jurisdiction, an item purchased from an out-of-state vendor will never be taxed at a higher tax than would be charged had the item been purchased from a vendor in that locality, there is no undue burden on interstate commerce.

Because Missouri's use tax statutes requires local use taxes to be limited to an amount that is compensatory for any local sales tax imposed, ***see Fall Creek Const. Co.*, 109 S.W.3d at 169**, they are constitutional. Accordingly, the AHC's decision is affirmed.

All concur

APPENDIX B

Before the
Administrative Hearing Commission
State of Missouri

[SEAL]

KIRKWOOD GLASS CO., INC., Petitioner,	)	
vs.	)	No. 03-1359 RS
DIRECTOR OF REVENUE, Respondent.	)	

DECISION

This Commission does not have jurisdiction to declare the local use tax statutes unconstitutional. We deny the application of Kirkwood Glass Co., Inc., for a use tax refund.

Procedure

Kirkwood Glass filed a complaint on July 2, 2003, challenging the Director of Revenue's final decision denying its claim for a refund of local use tax.

On May 21, 2004, the parties filed a stipulation of facts, with attached exhibits, and requested that we decide the case without an evidentiary hearing after setting a

briefing schedule.[1] Kirkwood Glass submitted the last brief on August 24, 2004.

Findings of Fact

Kirkwood Glass' Business

1. Kirkwood Glass is a Missouri corporation in good standing, with its principal Missouri business office located at 300 South Kirkwood Road, Kirkwood, Missouri.

2. Kirkwood Glass is a dual operator that sells windows and window accessories at retail and also installs windows as a contractor within the state of Missouri. Kirkwood Glass accrues and remits state and local sales or use tax on windows that it installs.

Sales and Use Tax Rates that Kirkwood Glass Paid

3. Kirkwood Glass has purchased tangible personal property for use in its business. Kirkwood Glass' purchases from sellers in Missouri were subject to state and local sales tax. Kirkwood Glass' purchases by orders given to and approved by out-of-state sellers and shipped from out of state to Kirkwood Glass' business location in Missouri were subject to state and local use tax.

4. During the period from April 1, 2002, through June 30, 2002, Kirkwood Glass incurred a 7.325 percent sales tax on its purchases of tangible personal property in

[1] The parties cite our Regulation 1 CSR 15-3.450, which was rescinded effective December 6, 2002. However, our current Regulation 1 CSR 15-3.440(3) provides for a decision on stipulated facts. We make our findings of fact based on the stipulation and the exhibits attached thereto.

Kirkwood, Missouri. This sales tax consists of a 4.225 percent state sales tax and a 3.10 percent local sales tax.

5. During the period from April 1, 2002, through June 30, 2002, Kirkwood Glass incurred a 4.725 percent sales tax on its purchases of tangible personal property in Williamsburg, Missouri. This sales tax consists of a 4.225 percent state sales tax and a 0.50 percent local sales tax.

6. During the period from April 1, 2002, through June 30, 2002, Kirkwood Glass incurred a 5.475 percent use tax on its purchases of tangible personal property that it ordered from out of state and shipped from out of state to its business location in Kirkwood, Missouri. This use tax consists of a 4.225 percent state use tax and a 1.25 percent local use tax.

7. The use tax rate in Williamsburg from April 1, 2002, through June 30, 2002, was 4.225 percent, the state use tax rate. There is no local use tax in Williamsburg, Missouri.

Effect of the Current Local Use Tax Statutes

8. Under the current local use tax, §§ 144.757 through 144.761,[2] not all property purchased in the state of Missouri is subject to a local use tax. Within the state of Missouri, various local taxing jurisdictions (counties and municipalities) have different amounts of use tax imposed on out-of-state purchases.

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[2] Statutory references are to the 2000 Revised Statutes of Missouri, unless otherwise noted.

9. The local use tax laws, as implemented and applied by the local enabling ordinances, impose a higher rate of tax on property purchased from out of state and used in a jurisdiction that imposes a local use tax (the taxing jurisdiction) than on similarly used property purchased in state in a jurisdiction with a lower sales tax rate than the taxing jurisdiction's use tax rate.

10. From April 1, 2002, through June 30, 2002, no county or municipality in Missouri imposed a use tax that was higher than its sales tax rate.

Kirkwood Glass' Claim for Refund of Local Use Tax

11. On January 22, 2003, Kirkwood Glass filed an application for a refund of all of the local use taxes that it had remitted for September 1999 through June 2002, in the amount of $6,371.63.

12. On June 12, 2003, the Director issued a final decision denying the refund claim.

Conclusions of Law

This Commission has jurisdiction over appeals from the Director's final decisions. Section 621.050.1. Kirkwood Glass has the burden to prove that it is entitled to a refund. Sections 136.300.1 and 621.050.2.

Kirkwood Glass' sole issue on appeal is that the current local use tax, §§ 144.757 through 144.761, violates the Commerce Clause. U.S. Const. art. I, § 8. Kirkwood Glass argues that the current local use tax discriminates against interstate commerce because goods that would be subject to local use tax in one local taxing jurisdiction

could be purchased subject to sales tax at a lower rate in another local taxing jurisdiction.

The Director, while noting that this Commission does not have jurisdiction to address the constitutional issue, asserts that the current local use tax statutes do not violate the Commerce Clause. The Director notes that the current local use tax statutes allow certain political subdivisions, on approval by a majority of the local electorate, to impose a local use tax equal to the local sales tax rate. Thus, the Director asserts that the current local use tax statutes do not discriminate against interstate commerce because the local use tax rate in each local taxing jurisdiction is always equal to or less than the corresponding local sales tax rate within the same local taxing jurisdiction.

I. History of Local Use Tax Statutes

Section 144.020 imposes a statewide sales tax of four percent on the sales price of tangible personal property sold in Missouri. Mo. Const. art. IV, § 43(a) imposes an additional 1/8 percent sales tax, and Mo. Const. art. IV, § 47(a) imposes an additional 1/10 percent sales tax, resulting in a total statewide sales tax of 4.225 percent. Section 144.610 imposes a statewide use tax of 4.225 percent on the sales price of tangible personal property sold outside of Missouri but stored, used, or consumed in Missouri.

We quote pertinent tax history from ***Associated Indus. of Missouri v. Director of Revenue,*** 857 S.W.2d 182, 185 (Mo. banc 1993):

> Other provisions authorize, but do not require, county and municipal governments to impose various local sales taxes on the sale of tangible personal property sold within their jurisdiction. *See, e.g.*, §§ 66.600 to 66.630, 67.500 to 67.545, 92.400 to 92.420, 94.500 to 94.510, 94.600 to 94.655, and 94.700 to 94.745. Prior to the enactment of § 144.748 [RSMo Supp. 1991], these permissive sales tax statutes resulted in an aggregate sales tax rate higher than 4.225 percent in the vast majority of counties and municipalities in the state, while the use tax on similar transactions made outside the state remained at 4.225 percent.

In 1990, the General Assembly enacted § 144.747, RSMo Supp. 1990, which gave counties and municipalities the option of levying a local use tax equivalent to their local sales tax. However, the General Assembly soon repealed the statute and enacted § 144.748, RSMo Supp. 1991, effective July 1, 1992, which imposed an additional flat use tax at the rate of 1.5 percent on the sales price of tangible personal property purchased outside the state.

Alumax Foils, Inc., and Associated Industries of Missouri filed suit in the Circuit Court of Cole County, asserting that § 144.748 violated the Commerce Clause. The circuit court held that the statute did not discriminate against interstate commerce. The Missouri Supreme Court affirmed. ***Associated Indus.***, 857 S.W.2d 182.

The United States Supreme Court granted certiorari and declared that Missouri's local use tax was unconstitutional in those locations where the local use tax exceeded the local sales tax. - ***Associated Indus. of Missouri v. Lohman,*** 114 S. Ct. 1815, 1824 (1994). We

quote extensively the Commerce Clause principles stated in that Court's opinion:

> Although the Commerce Clause is phrased merely as a grant of authority to Congress to "regulate Commerce . . . among the several States," Art. I, § 8, cl. 3, it is well established that the Clause also embodies a negative command forbidding the States to discriminate against interstate trade. See, *e. g., Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore., ante,* at 98; *New Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 273, 100 L. Ed. 2d 302, 108 S. Ct. 1803 (1988). The Clause prohibits economic protectionism – that is, "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.*, at 273-274. Thus, we have characterized the fundamental command of the Clause as being that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State," *Armco Inc. v. Hardesty,* 467 U.S. 638, 642, 81 L. Ed. 2d 540, 104 S. Ct. 2620 (1984), and have applied a "virtually *per se* rule of invalidity" to provisions that patently discriminate against interstate trade, *Philadelphia v. New Jersey,* 437 U.S. 617, 624, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978). By its terms, the additional use tax at issue in this case appears to violate the Commerce Clause's cardinal rule of nondiscrimination, for it exempts from its scope all sales of goods occurring within the State. See n. 2, *supra.* Nevertheless, our cases establish that such a levy may be saved from constitutional infirmity if it is a valid "compensatory tax" designed simply to make interstate commerce bear a burden already borne by intrastate commerce. Under the compensatory

tax doctrine, a facially discriminatory tax that imposes on interstate commerce the equivalent of an "identifiable and substantially similar tax on intrastate commerce does not offend the negative Commerce Clause." *Oregon Waste, ante*, at 103 (internal quotation marks omitted). To ensure that the State is indeed merely imposing countervailing burdens on comparable transactions, we have required that the taxes on interstate and intrastate commerce be imposed on "substantially equivalent event[s]." *Maryland v. Louisiana*, 451 U.S. 725, 759, 68 L. Ed. 2d 576, 101 S. Ct. 2114 (1981). See also *Armco, supra*, at 643. The end result under the theory of the compensatory tax is that, "when the account is made up, the stranger from afar is subject to no greater burdens . . . than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584, 81 L. Ed. 814, 57 S. Ct. 524 (1937).

To justify any levy as a compensatory tax, "a State must, as a threshold matter, 'identify . . . the [intrastate tax] burden for which the State is attempting to compensate.'" *Oregon Waste, ante*, at 103 (quoting *Maryland, supra*, 451 U.S. at 758). Respondents urge that the local sales taxes imposed by over a thousand political subdivisions within the State provide the burden on intrastate commerce that Missouri seeks to counterbalance through the use tax in this case. There is no dispute that sales taxes and use taxes such as those at issue here are imposed on "substantially equivalent event[s]." *Maryland, supra*, at 759. *Silas Mason* itself approved a system of sales and use taxes, and we have recognized that "[a] use

tax is generally perceived as a necessary complement to [a] sales tax." *Williams v. Vermont*, 472 U.S. 14, 24, 86 L. Ed. 2d 11, 105 S. Ct. 2465 (1985). *Cf. Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 66, 10 L. Ed. 2d 202, 83 S. Ct. 1201 (1963) ("The purpose of such a sales-use tax scheme is to make all tangible property used or consumed in the State subject to a uniform tax burden irrespective of whether it is acquired within the State . . . or from without the State").

Missouri's use tax scheme, however, runs afoul of the basic requirement that, for a tax system to be "compensatory," the burdens imposed on interstate and intrastate commerce must be equal. As we observed in *Maryland v. Louisiana*, the "common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce." 451 U.S. at 759. See also *Halliburton, supra*, at 70 ("Equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state"). Where a State imposes equivalent sales and use taxes, we have upheld the system under the Commerce Clause. See *Silas Mason, supra*, 300 U.S. at 584-587. But in Missouri, whether the 1.5% use tax is equal to (or lower than) the local sales tax is a matter of fortuity, depending entirely upon the locality in which the Missouri purchaser happens to reside. Where the use tax exceeds the sales tax, the discrepancy imposes a discriminatory burden on interstate commerce. Out-of-state goods brought into such a jurisdiction are subjected to a higher levy than are goods sold locally. The resulting disparity is incompatible with what we have termed the "strict rule of equality adopted in

Silas Mason." Halliburton, supra, 373 U.S. at 73. . . .

It should be apparent that in holding this scheme unconstitutional we impose no new restrictions on the State's power to delegate its taxing authority as it sees fit. What a State may not do is appeal to decentralized decisionmaking to augment its powers: It may not grant its political subdivisions a power to discriminate against interstate commerce that the State lacked in the first instance.

The State remains free to authorize political subdivisions to impose sales or use taxes, as long as discriminatory treatment of interstate commerce does not result. Other States apparently have had little difficulty in combining some local autonomy with the commands of the Commerce Clause. As the parties stipulated, App. 35, 28 States that provide political subdivisions some authority to impose use taxes have devised systems to ensure that use taxes are not higher than sales taxes within the same taxing jurisdiction. See, *e.g.*, Ga. Code Ann. § 48-8-110 (Supp. 1994) (requiring the enactment of a local use tax to be coupled with the adoption of an equivalent sales tax).

B

As our discussion above makes clear, Missouri's use tax scheme impermissibly discriminates against interstate commerce only in those localities where the local sales tax is less than 1.5%. . . .

C

That we have declared the tax scheme impermissibly discriminatory in some localities does not in itself dictate the relief that the State must provide. As we noted in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 39-40, 110 L. Ed. 2d 17, 110 S. Ct. 2238 (1990), a "State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination." We have suggested that the provision of a "meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing" is itself sufficient to satisfy constitutional concerns. *Id.*, at 38, n. 21. Because the parties have not addressed the procedures that were available in Missouri to contest the tax, any effect Missouri's procedures might have on the appropriate remedy in this case is best left for consideration on remand. Even if no such predeprivation procedure existed, the Due Process Clause would demand only that, "to cure the illegality of the tax as originally imposed, the State must ultimately collect a tax for the contested tax period that in no respect impermissibly discriminates against interstate commerce." *Id.*, at 44, n. 27. The methods best adapted to achieving equal treatment in this case, whether partial or complete refunds or other measures, are similarly matters properly left for determination on remand.

Id. at 1820-25.

On April 23, 1996, upon remand, the Missouri Supreme Court declared § 144.748 unconstitutional in its entirety. ***Associated Indus. of Missouri v. Director of***

Revenue, 918 S.W.2d 780 (Mo. banc 1996). The Court stated:

> In view of the [United States] Supreme Court's ruling, § 144.748 is reduced to something similar to what had previously been rejected, a patchwork scheme in which some jurisdictions have a use tax, and some do not. We refuse to speculate that the General Assembly would have approved the statute as now limited, and therefore we must strike down the statute altogether.

Id. at 785.

II. The Current Local Use Tax Statutes

The current local use tax statutes, which were effective June 27, 2000, provide:

Section 144.757:

> 1. Any county or municipality, except municipalities within a county of the first classification having a charter form of government with a population in excess of nine hundred thousand may, by a majority vote of its governing body, impose a local use tax if a local sales tax is imposed as defined in section 32.085, RSMo, at a rate equal to the rate of the local sales tax in effect in such county or municipality; provided, however, that no ordinance or order enacted pursuant to sections 144.757 to 144.761 shall be effective unless the governing body of the county or municipality submits to the voters thereof at a municipal, county or state general, primary or special election prior to August 7, 1996, or after December 31, 1996, a proposal to authorize the governing body of the county or municipality to

impose a local use tax pursuant to sections 144.757 to 144.761. Municipalities within a county of the first classification having a charter form of government with a population in excess of nine hundred thousand may, upon voter approval received pursuant to paragraph (b) of subdivision (2) of subsection 2 of this section, impose a local use tax at the same rate as the local municipal sales tax with the revenues from all such municipal use taxes to be distributed pursuant to subsection 4 of section 94.890, RSMo. The municipality shall within thirty days of the approval of the use tax imposed pursuant to paragraph (b) of subdivision (2) of subsection 2 of this section select one of the distribution options permitted in subsection 4 of section 94.890, RSMo, for distribution of all municipal use taxes.

2. (1) The ballot of submission, except for counties and municipalities described in subdivisions (2) and (3) of this subsection, shall contain substantially the following language:

Shall the . . . (county or municipality's name) impose a local use tax at the same rate as the total local sales tax rate, currently . . . (insert percent), provided that if the local sales tax rate is reduced or raised by voter approval, the local use tax rate shall also be reduced or raised by the same action? A use tax return shall not be required to be filed by persons whose purchases from out-of-state vendors do not in total exceed two thousand dollars in any calendar year.

[ ] YES [ ] NO

If you are in favor of the question, place an "X" in the box opposite "Yes". If you are opposed to the question, place an "X" in the box opposite "No".

(2) (a) The ballot of submission in a county of the first classification having a charter form of government with a population in excess of nine hundred thousand shall contain substantially the following language:

For the purposes of preventing neighborhood decline, demolishing old deteriorating and vacant buildings, rehabilitating historic structures, cleaning polluted sites, promoting reinvestment in neighborhoods by creating the (name of county) Community Comeback Program; and for the purposes of enhancing local government services; shall the county governing body be authorized to collect a local use tax equal to the total of the existing county sales tax rate of (insert tax rate), provided that if the county sales tax is repealed, reduced or raised by voter approval, the local use tax rate shall also be repealed, reduced or raised by the same voter action? The Community Comeback Program shall be required to submit to the public a comprehensive financial report detailing the management and use of funds each year.

A use tax is the equivalent of a sales tax on purchases from out-of-state sellers by in-state buyers and on certain taxable business transactions. A use tax return shall not be required to be filed* by persons whose purchases from out-of-state vendors do not in total exceed two thousand dollars in any calendar year.

[ ] YES [ ] NO

If you are in favor of the question, place an "X" in the box opposite "Yes". If you are opposed to the question, place an "X" in the box opposite "No".

(b) The ballot of submission in a municipality within a county of the first classification having a charter form of government with a population in excess of nine hundred thousand shall contain substantially the following language:

Shall the municipality be authorized to impose a local use tax at the same rate as the local sales tax by a vote of the governing body, provided that if any local sales tax is repealed, reduced or raised by voter approval, the respective local use tax shall also be repealed, reduced or raised by the same action? A use tax return shall not be required to be filed by persons whose purchases from out-of-state vendors do not in total exceed two thousand dollars in any calendar year.

[ ] YES [ ] NO

If you are in favor of the question, place an "X" in the box opposite "Yes". If you are opposed to the question, place an "X" in the box opposite "No".

(3) The ballot of submission in any city not within a county shall contain substantially the following language:

Shall the . . . (city name) impose a local use tax at the same rate as the local sales tax, currently at a rate of . . . (insert percent) which includes the capital improvements sales tax and the transportation tax, provided that if any local sales tax is repealed, reduced or raised by voter approval, the respective local use tax shall also be repealed, reduced or raised by the same action? A use tax return shall not be required to be filed by persons whose purchases

from out-of-state vendors do not in total exceed two thousand dollars in any calendar year.

[ ]YES [ ]NO

If you are in favor of the question, place an "X" in the box opposite "Yes". If you are opposed to the question, place an "X" in the box opposite "No".

(4) If any of such ballots are submitted on August 6, 1996, and if a majority of the votes cast on the proposal by the qualified voters voting thereon are in favor of the proposal, then the ordinance or order and any amendments thereto shall be in effect October 1, 1996, provided the director of revenue receives notice of adoption of the local use tax on or before August 16, 1996. If any of such ballots are submitted after December 31, 1996, and if a majority of the votes cast on the proposal by the qualified voters voting thereon are in favor of the proposal, then the ordinance or order and any amendments thereto shall be in effect on the first day of the calendar quarter which begins at least forty-five days after the director of revenue receives notice of adoption of the local use tax. If a majority of the votes cast by the qualified voters voting are opposed to the proposal, then the governing body of the county or municipality shall have no power to impose the local use tax as herein authorized unless and until the governing body of the county or municipality shall again have submitted another proposal to authorize the governing body of the county or municipality to impose the local use tax pursuant to sections 144.757 to 144.761 and such proposal is approved by a majority of the qualified voters voting thereon.

3. The local use tax may be imposed at the same rate as the local sales tax then currently in effect in the county or municipality upon all transactions which are subject to the taxes imposed pursuant to sections 144.600 to 144.745 within the county or municipality adopting such tax; provided, however, that if any local sales tax is repealed or the rate thereof is reduced or raised by voter approval, the local use tax rate shall also be deemed to be repealed, reduced or raised by the same action repealing, reducing or raising the local sales tax.

4. For purposes of sections 144.757 to 144.761 and sections 67.478 to 67.493, RSMo, the use tax may be referred to or described as the equivalent of a sales tax on purchases made from out-of-state sellers by in-state buyers and on certain intrabusiness transactions. Such a description shall not change the classification, form or subject of the use tax or the manner in which it is collected.

Section 144.759:

1. All local use taxes collected by the director of revenue pursuant to sections 144.757 to 144.761 on behalf of any county or municipality, less one percent for cost of collection, which shall be deposited in the state's general revenue fund after payment of premiums for surety bonds as provided in section 32.087, RSMo, shall be deposited with the state treasurer in a local use tax trust fund, which fund shall be separate and apart from the local sales tax trust funds. The moneys in such local use tax trust fund shall not be deemed to be state funds and shall not be commingled with any funds of the state. The director of revenue shall keep accurate records of

the amount of money in the trust fund which was collected in each county or municipality imposing a local use tax, and the records shall be open to the inspection of officers of the county or municipality and to the public. No later than the tenth day of each month, the director of revenue shall distribute all moneys deposited in the trust fund during the preceding month, except as provided in subsection 2 of this section to the county or municipality treasurer, or such other officer as may be designated by the county or municipality ordinance or order, of each county or municipality imposing the tax authorized by sections 144.757 to 144.761, the sum due the county or municipality as certified by the director of revenue.

2. The director of revenue shall distribute all moneys which would be due any county of the first classification having a charter form of government and having a population of nine hundred thousand or more to the county treasurer or such other officer as may be designated by county ordinance, who shall distribute such moneys as follows: the portion of the use tax imposed by the county which equals one-half the rate of sales tax in effect for such county shall be disbursed to the county community comeback trust authorized pursuant to sections 67.478 to 67.493, RSMo. The treasurer or such other officer as may be designated by county ordinance shall distribute one-third of the balance to the county and to each city, town and village in group B according to section 66.620, RSMo, as modified by this section, a portion of the remainder of such balance equal to the percentage ratio that the population of each such city, town or village bears to the total population of all such group B

cities, towns and villages. For the purposes of this subsection, population shall be determined by the last federal decennial census or the latest census that determines the total population of the county and all political subdivisions therein. For the purposes of this subsection, each city, town or village in group A according to section 66.620, RSMo, but whose per capita sales tax receipts during the preceding calendar year pursuant to sections 66.600 to 66.630, RSMo, were less than the per capita countywide average of all sales tax receipts during the preceding calendar year, shall be treated as a group B city, town or village until the per capita amount distributed to such city, town or village equals the difference between the per capita sales tax receipts during the preceding calendar year and the per capita countywide average of all sales tax receipts during the preceding calendar year.

3. The director of revenue may authorize the state treasurer to make refunds from the amounts in the trust fund and credited to any county or municipality for erroneous payments and overpayments made, and may redeem dishonored checks and drafts deposited to the credit of such counties or municipalities. If any county or municipality abolishes the tax, the county or municipality shall notify the director of revenue of the action at least ninety days prior to the effective date of the repeal, and the director of revenue may order retention in the trust fund, for a period of one year, of two percent of the amount collected after receipt of such notice to cover possible refunds or overpayment of the tax and to redeem dishonored checks and drafts deposited to the credit of such accounts. After one year has elapsed after the effective

date of abolition of the tax in such county or municipality, the director of revenue shall authorize the state treasurer to remit the balance in the account to the county or municipality and close the account of that county or municipality. The director of revenue shall notify each county or municipality of each instance of any amount refunded or any check redeemed from receipts due the county or municipality.

4. Except as modified in sections 144.757 to 144.761, all provisions of sections 32.085 and 32.087, RSMo, applicable to the local sales tax, except for subsection 12 of section 32.087, RSMo, and all provisions of sections 144.600 to 144.745 shall apply to the tax imposed pursuant to sections 144.757 to 144.761, and the director of revenue shall perform all functions incident to the administration, collection, enforcement, and operation of the tax.

Section 144.761:

1. No county or municipality imposing a local use tax pursuant to sections 144.757 to 144.761 may repeal or amend such local use tax unless such repeal or amendment is submitted to and approved by the voters of the county or municipality in the manner provided in section 144.757; provided, however, that the repeal of the local sales tax within the county or municipality shall be deemed to repeal the local use tax imposed pursuant to sections 144.757 to 144.761.

2. Whenever the governing body of any county or municipality in which a local use tax has been imposed in the manner provided by sections 144.757 to 144.761 receives a petition, signed by fifteen percent of the registered voters

of such county or municipality voting in the last gubernatorial election, calling for an election to repeal such local use tax, the governing body shall submit to the voters of such county or municipality a proposal to repeal the county or municipality use tax imposed pursuant to sections 144.757 to 144.761. If a majority of the votes cast on the proposal by the registered voters voting thereon are in favor of the proposal to repeal the local use tax, then the ordinance or order imposing the local use tax, along with any amendments thereto, is repealed. If a majority of the votes cast by the registered voters voting thereon are opposed to the proposal to repeal the local use tax, then the ordinance or order imposing the local use tax, along with any amendments thereto, shall remain in effect.

III. Constitutionality of the Current Local Use Tax Statutes

This Commission does not have jurisdiction to consider constitutional challenges to statutes. ***General Motors Corp. v. Director of Revenue***, 981 S.W.2d 561, 563 (Mo. banc 1998). We must apply the statutes as written. ***Bridge Data Co. v. Director of Revenue***, 794 S.W.2d 204, 207 (Mo. banc 1990). However, we have a statutory duty to make findings of fact and conclusions of law in cases before us. Section 536.090.

We have made findings of fact based on the stipulations and exhibits. Those findings include a finding that from April 1, 2002, through June 30, 2002, no county or municipality in Missouri imposed a use tax that was higher than its sales tax rate. In ***Associated Indus. of Missouri v. Lohman***, 114 S. Ct. at 1824, the United

States Supreme Court noted that some states have devised systems to ensure that use taxes are not higher than sales taxes within the same taxing jurisdiction. Section 144.757.1 provides that the local use tax shall be at the same rate as the local sales tax. Section 144.757.3 further provides that "if any local sales tax is repealed or the rate thereof is reduced or raised by voter approval, the local use tax rate shall also be deemed to be repealed, reduced or raised by the same action repealing, reducing or raising the local sales tax." Therefore, as provided by the terms of the current local use tax statutes, and in actual effect as shown by our findings, the use tax rate was not higher than the sales tax rate within any local taxing jurisdiction from April 1, 2002, through June 30, 2002.[3]

Kirkwood Glass appealed the Director's final decision to this Commission, and it has the burden of proof Sections 136.300.1 and 621.050.2. The sole claim that Kirkwood Glass has raised in this appeal is that the current local use tax, §§ 144.757 through 144.761, violates the Commerce Clause. U.S. Const. art. I. § 8. Because we cannot declare statutes unconstitutional, ***General Motors***, 981 S.W.2d at 563, we do not have jurisdiction to give Kirkwood Glass the relief that it seeks.[4] Therefore, we must conclude that Kirkwood Glass was liable for the local use tax for April 1, 2002, through June 30, 2002, and is not entitled to a refund of local use tax.

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[3] We note that Kirkwood Glass' refund claim is for taxes paid from September 1999 through June 2002, but the parties, in their stipulated facts, have not provided facts for any periods prior to April 1, 2002.

[4] In contrast, ***Associated Industries*** began as an action in the Circuit Court of Cole County and did not come before this Commission.

Summary

This Commission does not have jurisdiction to declare the local use tax statutes unconstitutional. We deny the application of Kirkwood Glass for a use tax refund.

SO ORDERED on September 24, 2004.

JUNE STRIEGEL DOUGHTY
Commissioner

APPENDIX C

[SEAL]

CLERK OF SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

THOMAS F. SIMON
CLERK

August 2, 2005

TELEPHONE
(573) 751-4144

Mr. James C. Owen
Ms. Katharine S. Walsh
Suite 300
16141 Swingley Ridge Road
Chesterfield, MO 63017

In Re: Kirkwood Glass Co., Inc., Appellant, vs. Director of Revenue, Respondent.
Missouri Supreme Court No. SC86347

Dear Counsel:

Please be advised that the Court issued the following order on this date in the above-entitled cause:

"Appellant's motion for rehearing overruled."

Very truly yours,

THOMAS F. SIMON

Cynthia L. Turley
Deputy Clerk, Court en Banc

cc:
Mr. Roger Freudenberg
Mr. James R. Layton/Office of Missouri Attorney General
Mr. Galen P. Beaufont, Mr. William D. Geary
Mr. Ivan L. Schraeder
Ms. Patricia A. Hageman, Mr. Edward J. Hanlon

APPENDIX D

MISSOURI REVISED STATUTES (2000)

§ 32.087 12(1) For the purposes of any local sales tax imposed by an ordinance or order under the local sales tax law, all sales, except the same of motor vehicles, trailers, boats, and outboard motors, shall be deemed to be consummated at the place of business of the retailer unless the tangible personal property sold is delivered by the retailer or his agent to an out-of-state destination.

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§ 144.615 Exemptions. – There are specifically exempted from the taxes levied in sections 144.600 to 144.745: . . .

(2) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed under the Missouri sales tax law; . . .

(5) Tangible personal property which has been subjected to a tax by any other state in this respect to its sales or use; provided, if such tax is less than the tax imposed by sections 144.600 to 144.745, such property, if otherwise taxable, shall be subject to a tax equal to the difference between such tax and the tax imposed by sections 144.600 to 144.745. . . .

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§ 144.757. Local use tax to fund community comeback program – rate of tax – St. Louis County – ballot submission – notice to director of revenue – repeal or reduction of local sales tax, effect on local use tax. – 1. Any county or municipality, except municipalities within

a county of the first classification having a charter form of government with a population in excess of nine hundred thousand may, by a majority vote of its governing body, impose a local use tax if a local sales tax is imposed as defined in section 32.085, RSMo, at a rate equal to the rate of the local sales tax in effect in such county or municipality; provided, however, that no ordinance or order enacted pursuant to sections 144.757 to 144.761 shall be effective unless the governing body of the county or municipality submits to the voters thereof at a municipal, county or state general, primary or special election prior to August 7, 1996, or after December 31, 1996, a proposal to authorize the governing body of county or municipality to impose a local use tax pursuant to sections 144.757 to 144.761.

2. (1). The ballot of submission, except for counties and municipalities described in subdivisions (2) and (3) of this subjection, shall contain substantially the following language:

Shall the.....(county or municipality's name) impose a local use tax at the same rate as the total local sales tax rate, currently.....(insert percent), provided that if the local sales tax rate is reduced or raised by voter approval, the local use tax rate shall also be reduced or raised by the same action? A use tax return shall not be required to be filed by persons whose purchases from out-of-state vendors do not in total exceed two thousand dollars in any calendar year.

☐ YES ☐ NO

If you are in favor of the question, place an "X" in the box opposite "Yes." If you are opposed to the question, place an "X" in the box opposite "No." . . .

3. The local use tax may be imposed at the same rate as the local sales tax then currently in effect in the county

or municipality upon all transactions which are subject to the taxes imposed pursuant to sections 144.600 to 144.745 within the county or municipality adopting such tax; provided, however, that if any local sales tax is repealed or the rate thereof is reduced or raised by voter approval, the local use tax rate shall also be deemed to be repealed, reduced or raised by the same action repealing, reducing or raising the local sales tax.

---

§ 144.759

* * *

4. Except as modified in sections 144.757 to 144.761, all provisions of sections 32.085 and 32.087, RSMo, applicable to the local sales tax, except for subsection 12 of section 32.087, RSMo, and all provisions of sections 144.600 to 144.745 shall apply to the tax imposed pursuant to sections 144.757 to 144.761, and the director of revenue shall perform all functions incident to the administration, collection, enforcement, and operation of the tax.

---

(2)

No. 05-452

IN THE SUPREME COURT OF THE UNITED STATES

KIRKWOOD GLASS CO., INC.,
Petitioner,

v.

MISSOURI DIRECTOR OF REVENUE,
Respondent.

On Writ Of Certiorari
To The Supreme Court of Missouri

BRIEF IN OPPOSITION

JEREMIAH W. (JAY) NIXON
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QUESTION PRESENTED

Does Missouri violate the Commerce Clause and this Court's holding in *Associated Industries of Missouri v. Lohman*, 511 U.S. 641 (1994), by authorizing individual cities and counties to impose on out-of-state sellers a local use tax that is identical to the sales tax that they impose on in-state sellers?

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Missouri Revised Statutes (2000):

STATEMENT OF THE CASE

1. Missouri imposes a state sales tax as a means of collecting the revenue required to provide state services. That tax is applied in the simplest and most conventional way: at the point of purchase, *i.e.*, at the location of the retailer, regardless of whether the purchaser directs delivery to some other location. Thus the tax is imposed at the first point in both time and space where the purchaser controls item – its location, possession, and movement. The seller charges the same tax on every transaction, regardless of whether the purchaser carries the item home or has it shipped to another city or county.

Missouri also imposes a use tax. Like a sales tax, a use tax is generally imposed at the point – both in time and space – where the purchaser first has control of the item within the State of Missouri. But the match is imperfect. The State cannot and does not impose the tax on the out-of-state sale itself. Rather, it imposes the tax on the storage, use, or consumption of the item in Missouri. Mo. Rev. Stat. § 144.610 (2000). That difference is not the result of some desire by the State to differentiate between in- and out-of-state sales. It is the result of the limitations on the State's ability to tax out-of-state and interstate transactions.

In addition to a state sales tax, Missouri authorizes cities and counties to impose a local sales tax, which is then collected by the State on their behalf, using the same rules as, and along with, the state sales tax. Mo. Rev. Stat. § 32.087 (2000). Some cities and counties have exercised that option; some have not. Because each city or county independently chooses the sales tax

rate, the level of tax varies.[1]

Missouri also allows cities and counties to impose a local use tax. Mo. Rev. Stat. § 144.757.1 (2000). The use tax, too, is collected by the State on their behalf, using the same rules as, and along with, the state use tax. When a city or county adopts a local use tax, it is automatically set at the same level as the local sales tax. *Id.* Thus the local use tax varies from place to place, just as the local sales tax does.

In the early 1990s, Missouri tried a different approach for local use tax. Relieving out-of-state sellers from having to calculate the use tax for each individual city or county, the State imposed a "local" tax at a single, statewide rate – in effect, raising the state use tax rate and giving the resulting revenue to the cities and counties. That created inequities: in some cities the sales tax rate was higher than the uniform statewide "local" use tax rate; in others it was lower. In *Associated Industries of Missouri v. Lohman*, 511 U.S. 641 (1994), this Court concluded that in any jurisdiction where the sales tax was lower than the uniform "local" use tax, the use tax could not constitutionally be applied to the extent of the differential. On remand, the Missouri Supreme Court determined that there was no way to sever provisions of the statute to solve that problem, and struck down the entire tax. *Associated Industries of Missouri v. Director of Revenue*, 918 S.W.2d 780 (Mo. banc 1996).

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[1] The Missouri Department of Revenue publishes sales tax charts that show the total amount of tax for each jurisdiction, which it makes available on the Internet at http://www.dor.mo.gov/tax/business/sales/#stris. The statewide rate is uniform; the differences are the result of exercising the local sales tax option, and setting a local sales tax rate.

The Missouri General Assembly then enacted the present scheme, abandoning its attempt to simplify the system with a uniform levy. The State now authorizes each city or county to impose a local use tax. Not all cities and counties have imposed a local sales tax, and not all cities and counties that have imposed a sales tax have imposed a use tax. But again, if a city or county opts to impose a local use tax, the local use tax rate is exactly the same as that city's or county's local sales tax rate.

As noted above, the local sales and use taxes are collected by the State, and are thus imposed at the same time as the state sales and use taxes. What matters for such a local tax, of course, is not just when the tax is imposed, but where; the location at which the tax is imposed dictates the tax rate. As noted above, sales tax is imposed at the point of purchase. Thus the tax collected includes the "local" sales tax for the city or county where the purchase takes place, regardless of any subsequent movement or delivery. Use tax is imposed at the location of first "use" – usually the location where the item arrives in Missouri under the control of the purchaser. Consistent with that approach, those out-of-state sellers who collect and remit Missouri use tax charge the rate for the location to which the purchaser directs that goods be shipped, regardless of where they may ultimately be consumed.

2. Petitioner sought a refund of local use tax it had paid. *See* Petition Appendix ("Pet. App.") A-11, A-13. When the Director of Revenue denied that request, Petitioner sought relief in Missouri's Administrative Hearing Commission. Petitioner argued that the current local use tax scheme violated the Commerce Clause by favoring in-state sellers. The Commission, which lacks jurisdiction to address constitutional

claims, upheld the Director's decision. *See* Pet. App. A-31 – A-33. Invoking its statutory right to direct review (Mo. Rev. Stat. §§ 621.050 and 621.189), Petitioner then took its constitutional claim to the Missouri Supreme Court.

There, Petitioner could not base its claim of discrimination against out-of-state transactions on comparing a local purchase to a local delivery from an out-of-state seller. Regardless of whether the seller was a Kirkwood seller or an out-of-state seller who shipped to Petitioner in Kirkwood, the tax rate would be identical.

Petitioner thus turned to a pair of dissimilar transactions. One was the same out-of-state purchase with delivery to Kirkwood. But the other was a purchase in a different, distant, Missouri city, Williamsburg. Williamsburg's sales tax is much lower than Kirkwood's. Pet. App. at A-7. Petitioner pointed out that it would pay a higher tax on the purchase of an item from another state shipped to Kirkwood than it would pay on the same item if purchased in Williamsburg. *Id.* Petitioner did not address the comparison between the purchase in Williamsburg and an out-of-state purchase that was shipped to Williamsburg. That omission was understandable: because Williamsburg has no local use tax, the out-of-state purchase would be subject to a *lower* tax than the in-state one.

The Missouri Supreme Court rejected Petitioner's comparison. That Court inferred that the constitutional problem in the prior scheme arises when "out-of-state goods brought into such a jurisdiction are subjected to a higher levy than are goods sold locally." *Associated Industries*, 511 U.S. at 648-49, quoted, Pet. App. A-8. The Missouri Court concluded that the new scheme, by setting every local use tax at precisely the same

rate as the sales tax, does not present that problem:

> This means that no purchaser is required to pay a higher tax on items shipped to that jurisdiction than they would if they purchased the item in-state within the same locality. Out-of-state sellers are also assured that purchasers will not pay a higher tax than if the item were purchased in-state within the same locality. In fact, since several jurisdictions within Missouri impose no local use taxes at all, many out-of-state purchases are taxed at a lower rate than were the item purchased in-state in the same jurisdiction to which the out-of-state item would be delivered.

Pet. App. at A-9 – A-10.

THE PETITION SHOULD BE DENIED

The decision of the Missouri Supreme Court is in complete harmony with this Court's precedents, including *Associated Industries*. Permitting a city or county to impose sales and use taxes at identical rates simply does not discriminate against interstate commerce.

1. Imposing a use tax without a corresponding sales tax would give in-state sellers a considerable – and unconstitutional – competitive advantage. But imposing a sales tax without a corresponding use tax gives out-of-state sellers a similar advantage. Thus a use tax is "a necessary complement to [a] sales tax." *Williams v. Vermont*, 472 U.S. 14, 24 (1985).

The Court's statement in *Williams* was carefully phrased: use taxes "complement," but they do not duplicate sales taxes. They derive revenue from similar or even parallel transactions. But they are not imposed on the same acts or at the same points. Nor could they be. Sales tax is imposed on a sale at the point of sale, necessarily within the jurisdiction of the taxing entity. The tax is imposed there – in Missouri, at least – despite the fact that the purchaser may carry, or even direct delivery, to some other point in the state. Use tax is not imposed on a purchase, and thus not at a point of purchase. Instead, it is imposed when and where an item comes under the State's authority – when and where it is first stored, used, or consumed in the state. Mo. Rev. Stat. § 144.610 (2000). "Use" is a term of art; it does not necessarily mean what a layperson may believe. "Use" occurs, generally, when and where a purchaser exercises the rights or powers of ownership of the purchased item, within the State. Mo. Rev. Stat. § 144.605(13) (2000).

Because sales and use taxes are imposed at different points in the movement of goods in commerce, it is hardly surprising that in some circumstances they may result in different levels of taxation as to particular goods, even though those goods may eventually reach the same location. Of course, it is possible for those differences to become problematic – *i.e.*, for a use tax to "run[] afoul of the basic requirement that, for a tax system to be 'compensatory' the burdens on interstate and intrastate commerce must be equal." *Williams v. Vermont*, 472 U.S. 14, 24 (1985). But the mere possibility that a particular state's scheme permits some sellers or purchasers to structure transactions and direct delivery so as to take advantage of differing rates among cities and counties does not violate any existing rule of constitutional law.

2. Searching for a conflict that would suggest the need for this Court to consider such a rule, Petitioner points to a single, 27-year-old Ohio decision, *American Modulars Corp. v. Lindley*, 376 N.E.2d 575 (Ohio), *cert. denied*, 439 U.S. 911 (1978). On its face, the current statutory scheme in Missouri seems similar to the one used in Ohio in the 1970's. But the Ohio court failed to address a critical nuance. The Court repeatedly referred to "goods used in taxing counties" without addressing what "use" meant. The Court simply did not address where "use" occurred when goods purchased out-of-state arrived in one county and were then carried to another. To paraphrase the language from this Court's decision in *Associated Industries* quoted by the Missouri Supreme Court, *American Modulars* does not tell us whether out-of-state goods brought into a *different* jurisdiction were subjected to a higher levy than were goods sold locally. *See Associated Industries*, 511 U.S. at 648-49, quoted, Pet. App. A-8.

Indeed, it is possible to infer that in Ohio, "use" occurred not where the goods were shipped into the state, but where they were consumed. The Ohio court spoke simultaneously of "goods sold out of state" (subject to use tax) that are "used in County A" and "goods sold in Ohio" in "County A" or "County B" (subject to sales tax) that are then "used in County A." 376 N.E.2d 575, 577. The term-of-art version of "use" has no application to sales tax. Employing the same term when describing hypotheticals involving both sales and use taxes suggests that the Ohio court meant "use" in its colloquial sense, not as a term of art. But again, the Ohio court was imprecise; it may be impossible to know for certain whether the Missouri law would survive the *American Modulars* holding.